

This letter determines that a device qualifies as a low sulfur dioxide emission coal-fueled device under 86 Ill. Adm. Code 130.335(b). (This is a PLR).

December 26, 2001

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of October 11, 2001. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, AAA, we are requesting a private letter ruling that the circulating fluidized bed boiler system ('CFB'), comprised of the equipment listed on the attached schedule, constitutes a 'low sulfur dioxide emission coal-fueled device' ('LSDECFD') within the meaning of 86 Ill. Adm. Code 130.335(b)(2) and therefore that AAA's purchase of the CFB will not be subject to Illinois Retailers' Occupation Tax ('ROT') or Use Tax ('UT'). To the best of our knowledge, the Illinois Department of Revenue ('Department') has not previously ruled on this issue or on a similar issue for the taxpayer or a predecessor. Nor has the same issue or a similar issue been previously submitted to the Department and withdrawn prior to the issuance of a letter ruling. Neither an audit nor litigation related to these matters is pending with the Department.

Procedural History

Per the suggestion of Mr. Terry Charlton, we summarize here the procedural steps that we have taken on this issue to date.

1. According to 86 Ill. Adm. Code 130.335(b)(2) qualification for the LSDECFD exemption is determined by the Department in 'consultation with the Pollution Control Board to determine if the device meets their standards and could be certified as a low sulfur dioxide emissions device.' We contacted the Department to determine the appropriate procedure to obtain confirmation of the LSDECFD exemption. Mr. Charlton referred us to the Illinois Pollution Control Board ('IPCB'), and advised that we must first obtain a written determination from the

IPCB that the CFB is a LSDECFD prior to requesting a Private Letter Ruling from the Department.

2. In accordance with the Mr. Charlton's instructions, we contacted a representative from the IPCB, explained the issue and indicated that the Department advised we obtain a preliminary determination from the IPCB. The IPCB representative indicated that the Illinois Environmental Protection Agency ('IEPA') makes the initial determination and provides a recommendation to the IPCB for consideration and therefore we must first contact the IEPA and submit the necessary documentation for consideration. The IPCB representative indicated that, after obtaining a recommendation from the IEPA, the IEPA's recommendation could then be presented to the IPCB for a determination. In our discussions with the IPCB representative, we made it clear that we were seeking a ROT/UT exemption and we provided the IPCB with a copy of 86 Ill. Adm. Code 130.335.
3. We followed the procedural steps outlined by the IPCB and contacted a representative from the IEPA who works in the Division of Air Pollution Control and who was already familiar with the CFB being purchased by AAA because he was responsible for processing the IEPA permit application, which has subsequently been approved and a permit issued to AAA. PERSON requested that we submit, for the IEPA 's consideration, summary of the components of the CFB, in addition to the main boiler component, that we believe qualifies as a LSDECFD. Accordingly, on March 29, 2001 we submitted our summary to the IEPA (see attached).
4. After lengthy consideration, on June 6, 2001, PERSON2 of the Permit Section of the Division of Air Pollution Control, responded by letter (see attached) and indicated that based upon the information we submitted in our proposal that the CFB 'appears to readily qualify as [a LSDECFD]....' However, PERSON2 noted that, procedurally, the IEPA did not have the authority to make a determination in relation to an ROT exemption.
5. In response to PERSON2's comments, we again contacted the IPCB, the agency named in the Department's regulation, 86 Ill. Adm. Code 130.335(b), and requested written procedures necessary for us to obtain the determination required by the Department. At this time, we learned for the first time that what we had been asked to do was to follow the procedure that is utilized for obtaining a property tax exemption certification, which was not what was being sought by AAA. The representative from the IPCB explained that the IPCB had never before received a request for a determination relating to the ROT LSDECFD exemption, but that legal counsel from both the IPCB and the IEPA would work with the Department to resolve this matter, if possible.
6. On July 5, 2001, PERSON3, issued a written response (see attached). In his letter PERSON3 stated that, after reviewing the relevant authority, it is his opinion that neither the IEPA nor the IPCB has the statutory authority to make a determination regarding qualification for an exemption under the ROT Act. PERSON3 advised that the correct agency for such determination is the Department.

7. Following PERSON3's advice, we again contacted Mr. Charlton to determine how to proceed. Mr. Charlton indicated that the Department was working on procedures to handle this matter and that we, BBB, have apparently exhausted our efforts on behalf of AAA to follow the Department's initial instructions to obtain a determination from the IPCB. Accordingly, Mr. Charlton advised us to submit the request for a private letter ruling without attempting further to obtain determinations from the IPCB or the IEPA.

Statement of Facts

AAA is in the business of generating electricity for sale to its co-operatives. In generating electricity, AAA utilizes four boilers to burn coal. AAA will replace three of its existing 33-megawatt boilers at its CITY/STATE facility with a new Foster Wheeler CFB that will have a 120-megawatt gross capacity. According to Attachment B, Table 1 of the construction permit issued by the IEPA (copy enclosed), the three existing boilers have a combined annual SO₂ emission rate of 12,227 tons per year and the CFB will have an annual SO₂ emission rate of 3,142.8 tons per year. Thus, implementation of the CFB combined with the shutdown of the three existing boilers will result in an increased megawatt capacity of approximately 20 percent with an annual net SO₂ emission decrease of approximately 75% (9,084.2 tons per year).

The CFB will be attached to an existing turbine at the facility. In addition to the CFB, AAA will purchase additional items such as a main steam line, warehouses and other buildings, and switchyard modifications. The CFB and the additional items will be purchased by a contractor who will retransfer the CFB and additional items to AAA and install them at the CITY facility.

In the CFB, limestone is used to control nitrogen oxides and sulfur dioxide emissions via the combustion system and, as required, a selective non-catalytic reduction system. This system was chosen as the most economical alternative to meet existing sulfur dioxide and other emissions standards, both state and federal, without the need for supplementary SO₂ abatement devices, i.e., pollution control equipment/systems such as a flue gas desulfurization scrubber. The primary fuel that will be burned in the CFB will be coal mined in Illinois, including coal mine waste reclaimed in Illinois, which typically have higher sulfur contents. The IEPA has issued a permit (copy enclosed) to AAA to construct the system, wherein the IEPA has determined that the CFB will '(i) comply with applicable state air emission standards, (ii) comply with applicable federal New Source Performance Standards, 40 CFR 60, Subpart Da[, and] (iii) comply with all applicable Illinois Air Pollution Board Regulations....' IEPA, Construction Permit, Page 3, Sec. 7a. The IEPA also noted:

This permit is issued based on the proposed CFB Boiler not being a major new source of hazardous air pollutants for purposes of Section 112(g) of the Clean Air Act. This reflects a finding that the CFB boiler should reduce emissions of hazardous air pollutants from the Marion Generating Station, as it generally reduces emissions of air pollutants (refer to Attachment B, Table 1).

IEPA, Construction Permit, Page 3, Sec. 7a.

Ruling Requested

The CFB qualifies as a 'low sulfur dioxide emission coal-fuel device' as that term is defined in 86 Ill. Adm. Code 130.335(b), the purchase and sale of which is exempt from the ROT and UT.

Relevant Authority

35 ILCS 120/1a-1

'Low sulfur dioxide emission coal fueled devices' means any device sold or used or intended for the purpose of burning, combusting or converting locally available coal in a manner which eliminates or significantly reduces the need for additional sulfur dioxide abatement that would otherwise be required under State or Federal air emission standards. Such device includes all machinery, equipment, structures and all related apparatus of a coal gasification facility, including coal feeding equipment, designed to convert locally available coal into a low sulfur gaseous fuel and to manage all waste and byproduct streams.

The purchase, employment and transfer of such tangible personal property as low sulfur dioxide emission coal fueled devices is not a purchase, use or sale of tangible personal property.

This amendatory Act of 1981 is not intended to nor does it make any change in the meaning of any provision in this Section but is intended to remove possible ambiguities, thereby confirming the existing meaning of this Section in effect prior to the effective date of this amendatory Act of 1981.

* * *

86 Ill. Adm. Code 130.335

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(b) Low Sulfur Dioxide Emission Coal-Fuel Devices

(1) Notwithstanding the fact that the sales may be at retail, sales of low sulfur dioxide emission coal-fueled devices are exempt from the Retailers' Occupation Tax. This exemption extends to and includes the purchase of such a device, or materials to construct such a device which are physically incorporated into the device, by a contractor who retransfers the device to his customer in fulfillment of a contract to furnish such a device to, and install it for, his customer.

(2) Low sulfur dioxide emission coal-fueled devices means any device sold or used or intended for the purpose of burning, combusting or converting locally available coal in a manner which eliminates or significantly reduces the need for additional sulfur dioxide abatement that would otherwise be required under State or Federal air emission standards which will be determined by evaluating the output of sulfur dioxide from the device and consultation with the Pollution Control Board to determine if the device meets their standards and could be certified as a low sulfur dioxide emission device. With respect to coal gasification facilities, such devices include all machinery,

equipment, structures and related apparatus including coal feeding equipment designed to convert locally available coal into a low sulfur gaseous fuel and to manage all waste and by-product streams. (Section 1a-1 of the Act.)

(3) The exemption includes only the device and replacement parts. It does not extend to chemicals, catalysts, additives or fuels used in the combustion or conversion process. For devices which are not a part of a coal gasification facility, the exemption will not apply to buildings in which the device may be located, nor to machinery and equipment which may receive, store or process coal prior to its burning, combustion or conversion, nor to machinery and equipment used to distribute coal products, steam or energy from the process or remove waste products resulting from the process. For devices which are a part of a coal gasification facility, the exemption will include all machinery, equipment, structures and related apparatus including coalfeeding equipment and equipment to manage waste and byproducts streams. A device will qualify for the exemption even if it serves an industrial, manufacturing or other purpose which confers an economic benefit on the purchaser or is used for other purposes in addition to the burning, combusting or converting coal.

(4) The device must use or be intended to use locally available coal, i.e., coal mined in Illinois.

(5) Coal conversion includes a variety of processes which produce coal gas, liquid fuel or solid fuels. It does not encompass coal production or preparation techniques such as washing, crushing or pelletization of coal.

(6) The device or the operation in which it is used must be subject to State or Federal emission control standards and must, in its operation, eliminate or significantly reduce the need for supplementary sulfur dioxide abatement that would otherwise be required.

* * *

Discussion

Pursuant to 86 Ill. Adm. Code 130.335(b), there are essentially six requirements that must be satisfied in order for the CFB to qualify as a LSDECFD. In the following paragraphs, we will analyze the regulation's six requirements and apply the requirements to the CFB.

First, the regulation provides that the LSDECFD exemption 'extends to and includes the purchase of such a device, or materials to construct such a device which are physically incorporated into the device, by a contractor who retransfers the device to his customer in fulfillment of a contract to furnish such a device to, and install it for, his customer.' 86 Ill. Adm. Code 130.335(b)(1). As provided in the facts, a contractor will sell the CFB to AAA and install it and the CFB will subsequently be used by AAA at its CITY, Illinois facility to produce electricity. Therefore, the CFB clearly meets the first requirement in the regulation.

The second requirement in the regulation is that the device must be within the prescribed definition of a LSDECFD. The regulation defines a LSDECFD as 'any device sold or used or intended for the purpose of burning, combusting or converting locally available coal in a manner which eliminates or significantly reduces the need for

additional sulfur dioxide abatement that would otherwise be required under State or Federal air emission standards which will be determined by evaluating the output of sulfur dioxide from the device....' 86 Il. Adm. Code 130.335(b)(2). Correspondence from the IEPA, which processed a detailed permit application for the CFB, confirms that the CFB is a LSDECFD. Specifically, PERSON2 of the IEPA's Division of Air Pollution Control stated that the 'the proposed [CFB] appears to readily qualify as such a device, as it is intended to burn locally available coal and will do so in a manner that significantly reduces the need for additional sulfur abatement, i.e., an add-on SO₂ scrubber.' PERSON2 Correspondence dated June 6, 2001. Additionally, the IEPA has issued AAA a permit (see enclosed copy) to construct the new CFB boiler system, which is a formal indication from the IEPA that the CFB complies with Illinois environmental standards.

The regulation specifically indicates that whether a device meets government standards 'will be determined by evaluating the output of sulfur dioxide from the device and consultation with the Pollution Control Board to determine if the device meets their standards and could be certified as a low sulfur dioxide emission device.' 86 Il. Adm. Code 130.335(b)(2) (emphasis added). While it is unclear whether the regulation requires the taxpayer or the Department to 'consult' with the IPCB, as discussed in the 'Procedural History' section, AAA has taken exhaustive steps to satisfy this requirement. While both the IEPA and the IPCB have declined to make a formal determination on the ground that the agencies lack the statutory authority to do so (see letter of July 5, 2001), PERSON2 of the IEPA in his letter of June 6, 2001 stated that the CFB 'appears to readily qualify as such a device, as it is intended to burn locally available coal and will do so in a manner that significantly reduces the need for additional sulfur abatement, i.e., an add-on SO₂ scrubber.' Additionally, the IEPA has issued a permit to AAA for the construction of the CFB, indicating that applicable state environmental standards will be met. Therefore, since the CFB satisfies the definition of a LSDECFD and it will burn locally available coal in a manner that significantly reduces the need for additional sulfur abatement, the regulation's requirement is satisfied.

The third requirement in the regulation pertains to the scope of the exemption and provides that 'the exemption includes only the device and replacement parts. For devices which are not a part of a coal gasification facility, the exemption will not apply to buildings in which the device may be located, nor to machinery and equipment which may receive, store or process coal prior to its burning, combustion or conversion, nor to machinery and equipment used to distribute coal products, steam or energy from the process or remove waste products resulting from the process.... A device will qualify for the exemption even if it serves an industrial, manufacturing or other purpose which confers an economic benefit on the purchaser or is used for other purposes in addition to the burning, combustions or converting coal.' 86 Ill. Adm. Code 130.335(b)(3). As described in the 'facts' section, all of the components on the attached list qualify as part of the CFB. The list includes only components of the system that are clearly integral to the operation of a LSDECFD. The list of components for the CFB does not include: (1) the building in which the system will be stored; (2) machinery and equipment which receives, stores, or processes the coal prior to burning; or (3) machinery and equipment used to distribute coal products, steam or energy from the process or remove waste products resulting from the process. Therefore, since the CFB includes only integral components of the system, and does not include items specifically excluded pursuant to the regulation, the CFB meets the third requirement of the regulation.

The fourth requirement in the regulation provides that 'the device must use or be intended to use locally available coal, i.e., coal mined in Illinois.' 86 Il. Adm. Code 130.335(b)(4). As provided in the facts, the CFB will burn locally-mined (Illinois) coal, including coal mine waste reclaimed in Illinois. Therefore, the CFB satisfies the fourth requirement in the regulation.

The fifth requirement in the regulation provides that 'coal conversion includes a variety of processes which produce coal gas, liquid fuel or solid fuels. It does not encompass coal production or preparation techniques such as washing, crushing or pelletization of coal.' 86 Il. Adm. Code 130.335(b)(5). This requirement is not applicable because the CFB will burn, rather than convert, the coal.

The final requirement is that 'the device or the operation in which it is used must be subject to State or Federal emission control standards and must, in its operation, eliminate or significantly reduce the need for supplementary sulfur dioxide abatement that would otherwise be required.' 86 Il. Adm. Code 130.335(b)(6). As discussed in the facts, the IEPA has issued a permit to AAA allowing the construction of the CFB, which is a formal indication that the system complies with the necessary environmental standards. Moreover, as indicated above, PERSON2 of the Permit Section of the IEPA's Division of Air Pollution Control, which issued AAA the required IEPA permit, stated that the 'the proposed circulating fluidized bed boiler...[is] intended to burn locally available coal and will do so in a manner that significantly reduces the need for additional sulfur abatement, i.e., an add-on SO₂ scrubber.' Therefore, since the new CFB boiler system and AAA are subject to state and federal emission control standards and the operation of the system will significantly reduce the need for additional sulfur abatement, the CFB meets the sixth requirement in the regulation.

We are not aware of any case law or Department rulings that aid in the analysis of the LSDECFD exemption's applicability to AAA's CFB. We have found only one private letter ruling, ST 89-0325 (May 5, 1989), that has ruled that a device or process qualified as a LSDECFD.

Conclusion

The CFB, comprised of the equipment on the attached schedule, meets the applicable requirements of the LSDECFD exemption contained in 35 ILCS 120/1a-1 and 86 Il. Adm. Code 130.335(b). Therefore, we believe that AAA's purchase of the CFB qualifies as a 'low sulfur dioxide emission coal-fuel device' and, accordingly, its purchase by AAA and its contractor is exempt from ROT and UT.

We respectfully request confirmation of this conclusion in a private letter ruling. The undersigned is not aware of any authority contrary to this conclusion.

Please contact me if you have any questions concerning this matter, or if for any reason you tentatively determine that the requested ruling cannot be issued in whole or in part.

DEPARTMENT'S RESPONSE:

The Department is unable to make a factual determination whether the circulating fluidized boiler system described in your letter qualifies as a low sulfur dioxide emission coal-fueled device.

However, based upon the description of the circulating fluidized boiler system and its component parts provided in your letter and your assertion that it meets all of the requirements of 86 Ill. Adm. Code 130.335(b), the Department believes that the circulating fluidized boiler system described in your letter qualifies as a low sulfur dioxide emission coal-fueled device under Section 1a-1 of the Retailers' Occupation Tax Act and Section 2a-1 of the Use Tax Act.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have questions regarding this Private Letter Ruling you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk